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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JONG UK BYUN,

Plaintiff and Appellant,

v.

LOMA LINDA UNIVERSITY et al.,

Defendants and Appellants.

E069549

(Super.Ct.No. CIVDS1516693)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.
Affirmed.

Law Offices of Michael S. Lee and Michael S. Lee for Plaintiff and Appellant.

Clayson, Bainer & Saunders and Roland C. Bainer for Defendants and Appellants.

Appellant Jong Uk Byun lost real property in a foreclosure sale and sued for wrongful foreclosure, declaratory relief, cancellation of instruments, and quiet title.

The trial judge tried the equitable causes of action before the first cause of action, which sought damages and therefore required a jury. Respondents, Loma Linda University and LLUH-SB, Inc. (Loma Linda), prevailed at a bench trial on the equitable causes of action, and that result negated the issues Byun sought to try to a jury. After prevailing, Loma Linda moved for attorney fees, and the trial court denied the motion.

Byun appeals on the ground that the trial court denied him the right to a jury trial by first resolving the equitable causes of action at a bench trial. He also argues the trial court applied the wrong standard for the statutory notice requirements. Loma Linda cross-appeals, arguing the trial court should have awarded it attorney fees.

We conclude the trial court acted within its discretion in trying the equitable issues first, did not err in determining notice was proper, and properly denied Loma Linda's request for attorney fees. We therefore affirm.

I

FACTS

A. The Property, Default, and Trustee's Sale

On October 13, 2005, Byun and his spouse obtained a \$237,500 loan from Bank of America to purchase a vacant lot in San Bernardino and executed a promissory note on the property. The promissory note was secured by a deed of trust signed by both spouses.

The promissory note and the deed of trust both contained a clause relating to attorney fees. The promissory note provided for the award of attorney fees incurred in connection with collecting on the note. The deed of trust provided for recovery of “such sum as the court may adjudge reasonable as attorneys’ fees at trial and upon any appeal” in “any suit or action to enforce any of the terms of this Deed of Trust.”

In 2014, the Byuns fell behind on their payments and the trustee initiated default proceedings. The trustee recorded a notice of default on October 9, 2014. Byun admitted receiving the notice of default in the mail and reviewing it. The principal officer of the trustee testified at the bench trial. She said the trustee provided all notices that were legally required. They sent the notice of default and the notice of trustee’s sale to the Byun’s residential and business addresses, among others, by certified and first class mail. They also published a notice of trustee’s sale in the San Bernardino Sun and posted it on the property

Byun identified the business address and acknowledged he continued to do business there. He claimed both he and his spouse had moved out of the residence listed on the loan documents by July 2013. However, he admitted he never gave notice of that change to Bank of America or any successor.

The trustee’s sale occurred on May 7, 2015, and Loma Linda University tendered the winning bid of \$150,000.

B. The Trial Court Proceedings

Byun asked the trial court to hold a jury trial on his wrongful foreclosure cause of action before holding a bench trial on the equitable causes of action. Loma Linda requested a bench trial on the equitable causes of action before the jury trial. Both parties agreed a trial on the equitable issues would resolve all or most of the wrongful foreclosure cause of action. They agreed that if Loma Linda prevailed on the equitable causes of action, Byun could not prove wrongful foreclosure. They also agreed that if Byun prevailed on the equitable causes of action, the only remaining issue on the wrongful foreclosure cause of action would be the amount of damages.

The trial court decided to proceed with a bench trial on the equitable causes of action first and hold a jury trial on damages only if necessary. Byun's counsel then indicated the bench trial could be streamlined to focus on the issue whether "the notice of sale . . . was mailed, served, or posted to my client at the address on the deed of trust, which is the address that's used for the business."

At the end of the bench trial, the court issued a written statement of decision. The court found "the foreclosure proceedings were conducted in the legally required manner and did not unfairly deprive plaintiff of title to the subject property." The court relied on the promissory note and deed of trust, the notice of default, the notice of trustee's sale, the testimony of the principal of the trustee, the trustee's business records and Byun's testimony.

The court found “Plaintiff defaulted on the loan secured by the subject property. Plaintiff was given timely notice of the default and the opportunity and process to follow to cure the default, and instead attempted two partial payments which were rejected by defendant, Loma Linda University, holder of the note. Plaintiff was given timely notice of the Trustee’s Sale. Plaintiff did not cure the default prior to the Trustee’s sale. Defendant Loma Linda University bid \$150,000 at the Trustee’s sale, and was the sole bidder. The subject property was transferred to Loma Linda University by a Trustee’s deed.”

On the basis of these findings, the court dismissed all of Byun’s causes of action, declared the trustee’s deed upon sale valid, lawful, and enforceable against all claims of plaintiff, and entered judgment in Loma Linda’s favor.

Loma Linda moved for attorney fees of \$33,917.76 based on the language in the deed of trust and promissory note. The trial court denied the motion because “this lawsuit was not an action on the contract within the meaning of Civil Code section 1717. Plaintiff[’]s lawsuit did not seek to enforce either instrument.” The court held neither Byun’s causes of action nor Loma Linda’s defenses sought to enforce the promissory note or the deed of trust and the contractual provisions did not come into play, because they apply, by their terms, only to enforcement of the instruments themselves.

Byun appealed the judgment, and Loma Linda cross-appealed the denial of attorney fees.

II

ANALYSIS

A. *Right to a Jury Trial*

Byun argues the trial court denied him the right to a jury trial on his wrongful foreclosure claim when he decided to try his equitable causes of action first. We disagree.

“Historically, there were separate law and equity courts . . . [Though] [t]he separate law and equity courts were merged, . . . the distinction between law and equity remains.” (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 155.) A jury trial is a matter of right in a civil action at law, but not in equity. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1237.)

“Complications arise when legal and equitable issues (causes of action, requested remedies, or defenses) are asserted in a single lawsuit . . . In most instances, separate equitable and legal issues are “kept distinct and separate,” with legal issues triable by a jury and equitable issues triable by the court. [Citations.]’ [Citation.] The order of trial in these mixed actions has ‘great significance because the first fact finder may bind the second when determining factual issues common to the equitable and legal issues.’ [Citation.] Generally, in mixed actions, the equitable issues should be tried first by the court . . . because it promotes judicial economy by potentially obviating the need for a jury trial.” (*Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 408-409.)

That is precisely what happened in this case. The parties agreed trial of the equitable issues would resolve all or most of the wrongful foreclosure cause of action, leaving, at most, a question for the jury as to the amount of damages. The trial court acted within its broad discretion to decide the equitable issues first and empanel a jury to hear evidence related to damages only if necessary. The court's findings and ruling in the bench trial obviated the need for a trial on damages. We review the trial court's decision to try Byun's equitable issues first for abuse of discretion. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.) We see no basis for concluding the trial court acted unreasonably in this case.

Byun argues that Code of Civil Procedure section 592 (section 592) gives him a right to have a jury decide all issues of fact related to his cause of action for the recovery of real property. That provision says, "In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury." (§ 592.)

Case law makes clear, even if the statute does not, that this provision does not expand the jury right to include equitable issues and claims. The California Constitution guarantees a right to a jury trial in civil actions triable by a jury at common law. (*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 506.) The constitutional right to jury trial has the same scope as it did at common law in 1850, when the constitution was adopted. (*C & K Engineering Contractors v. Amber Steel Co.*

(1978) 23 Cal.3d 1, 8.) A “jury trial is a matter of right in a civil action at law, but not in equity.” (*Southern Pac. Transportation Co. v. Superior Court* (1976) 58 Cal.App.3d 433, 436.) Section 592 is based in the same history, and does not expand the right to jury trial beyond the scope as it existed at common law. (*Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1174.) Thus, the trial court did not exceed its authority by making factual findings in resolving Byun’s equitable claims.

Finally, Byun argues the trial court applied the wrong standard in deciding the trustee complied with the notice statutes. He says the trustee was required to send notices to “the last business or residence physical address *actually known* by the mortgagee, beneficiary, trustee, or other person authorized to record the notice of default.” (Civ. Code, § 2924b(b)(3), italics added.) He complains the trial court did not hold the trustee to that standard, but to the lesser standard of sending notice to addresses contained in the promissory note or deed of trust or in subsequent written notifications of change of address. Even assuming the trustee was required to provide notice to *any* new addresses they knew about, Byun doesn’t identify any address different than those disclosed on the documents, much less any evidence that the trustee actually knew of such an address. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 [“(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error”].) He has therefore failed to establish the trial court erred.

B. *Attorney Fees*

Loma Linda argues the trial court erred by denying its motion for legal fees. They point out the promissory note provides the borrower will pay lender's attorney fees incurred in collecting the note, and the deed of trust provides for recovery of attorney fees in "any suit or action to enforce any of the terms of this Deed of Trust."

We agree with Loma Linda that Civil Code section 1717 is not a basis for denying its motion for attorney fees. To the extent the trial court relied on that section as limiting recovery to causes of action that sound in contract, it erred. "By its terms, . . . Civil Code section 1717 has a limited application. It covers *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) However, "Civil Code section 1717 cannot be said to supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements." (*Ibid.*) Code of Civil Procedure section 1021 provides generally, "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Civil Code section 1717 does not bar an award of attorney fees because the causes of action did not sound in contract.

That doesn't end our inquiry, however; we must look to the parties' agreement. Here, the documents do in fact limit Loma Linda's recovery. The Deed of Trust says, "If

Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal." Loma Linda did not institute an action to enforce the terms of the deed of trust, so the trial court was correct to conclude the attorney fee provision did not apply. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 139 ["on appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning"].)

The promissory note is also limited. It provides the lender is entitled to recover attorney fees and legal expenses incurred in connection with "hir[ing] or pay[ing] someone else to help collect this Note if Borrower does not pay." Loma Linda concedes this lawsuit was not part of collecting on the note, but argues that its right to recover attorney fees related to collection "logically includes protection of what has been gained." We agree that a party could—logically—seek to recover attorney fees incurred defending the fruit of its collection activities. But the question is not what Loma Linda's predecessor could have asked for in the promissory note, but what it did ask for. We conclude the language of the promissory note does not extend to the recovery of attorney fees incurred defending a tort suit challenging whether it violated the borrower's rights in the manner in which it foreclosed the property.

Loma Linda relies on *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, but that case involved an instrument with far broader language. The note in *Jones* "provided that if it [was] not paid, the makers would 'pay all costs of collection

including, . . . reasonable attorney fees, and all expenses *in connection with the protection or realization of the collateral* securing th[e] Note. . . .’ The guarantee of the note contained a provision for attorney fees in ‘proceedings involving Guarantors that in any way affect the exercise by Lender of its rights and remedies hereunder.’” (*Id.* at p. 544.) The attorney fee provisions in the note and deed of trust do not extend to fees incurred in connection with protecting what Loma Linda recovered. Thus, we conclude the trial court properly denied their request for attorney fees.

III

DISPOSITION

We affirm the judgment and the order denying attorney fees. Each party shall bear their own costs on appeal.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.